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Draft non-binding guidelines on the management of frozen, seized and confiscated assets

Note by the Secretariat

1. At its fifth session, held in Panama City from 25 to 29 November 2013, the Conference of the States Parties to the United Nations Convention against Corruption adopted resolution 5/3, in which it encouraged States parties and the United Nations Office on Drugs and Crime (UNODC) to share experiences on the management, use and disposal of frozen, seized and confiscated assets, and to identify best practices as necessary, building upon existing resources that address the administration of seized assets, and to consider developing non-binding guidelines on that issue. At its sixth and seventh sessions, the Conference reinforced that mandate.

2. The purpose of the non-binding guidelines is to enhance effective approaches to asset management and disposal on the basis of the lessons learned from a broad range of countries. The guidelines are aimed at supporting States parties in the effective implementation of article 31, paragraph 3, of the United Nations Convention against Corruption, which obliges States parties to adopt measures to regulate the administration by the competent authorities of frozen, seized or confiscated property.

3. The non-binding guidelines are based on the work undertaken by UNODC since 2014, in cooperation with the government of Calabria, Italy, in particular on the study entitled *Effective Management and Disposal of Seized and Confiscated Assets*. In addition, they were discussed, reviewed and validated during the international expert group meeting on identifying good practices in the management and disposal of seized and confiscated assets, held in Washington, D.C., on 7 and 8 December 2017, with the participation of 46 experts representing 24 States and two international organizations.

4. The non-binding guidelines address three areas: (a) the administration of assets and, where possible, their disposal prior to a final confiscation; (b) the enforcement of confiscation orders and the use of confiscated assets; and (c) the institutional structure for asset management.

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5. Although the non-binding guidelines are not intended to impose any obligation on States parties, they may wish to take them into consideration, where appropriate, in improving their domestic procedures. As a potential next step, the non-binding guidelines could be complemented by a directory of country-specific resource material that reflects the broad range of approaches to asset management and disposal. The draft non-binding guidelines are set out in the annex to the present note.

Annex

Draft non-binding guidelines on the management of frozen, seized and confiscated assets

A. Administration of assets and, where possible, their disposal prior to a final confiscation

Guideline 1

States should build capacity in, and dedicate the necessary resources to, pre-seizure planning

Pre-seizure planning is the process of evaluating assets and confiscation scenarios prior to freezing assets or seizing property, with a view to assessing the options available and taking informed decisions. States should aim at making pre-seizure planning part of the routine, everyday work of law enforcement agencies. Decisions to be taken include the following:

- Should interim measures be taken at all?
- Which assets should be seized?
- Should the asset be left under the control of the owner or possessor (freezing), or should the responsible State institution take it under its control (seizure) (see guideline 3)?
- If the asset is left under the control of the owner or possessor, which restrictions on its use and disposal should be requested?
- If the asset is placed under the control of the responsible State institution, which administrative measures need to be prepared? Which legal liabilities and reputational risks need to be managed?
- Is there potential for pre-confiscation sale, disposal or use (see guidelines 2 and 3)?
- Does the management of the asset require a specific skill set not available within the authority responsible for the management of seized and confiscated assets, and what legal avenues are available to employ such skills, either through contractors or by applying to the court for the appointment of an asset manager?

The aim should be to draw up a logistical plan starting from the day of the seizure of the asset.

Legislation or standards of practice should define procedures for pre-seizure planning and provide criteria or guidance on when to seize property or freeze assets, taking into account, for example, expected resource requirements for maintenance, the estimated value of the asset to be seized and the law enforcement objectives of the interim measure. The responsibility for pre-seizure planning should generally lie with the entity responsible for the management of seized assets, in a consultative process with (other) law enforcement institutions.

Informed decisions on the questions listed above require the capacity for detailed research into the conditions, location, ownership status, value, law enforcement benefits and specialist expertise needed for the management of the asset. Law enforcement agencies need to have access to the multidisciplinary skill set necessary to take informed decisions in the pre-seizure phase.

Guideline 2

States should permit pre-confiscation sale with the owner's consent or without the owner's consent in defined scenarios

The ultimate goal when managing seized assets is to ensure that they are preserved at minimum cost and yield maximum return when realized. In view of the cost of asset management and the time needed until a final decision is made, States should consider the possibility of pre-confiscation sale or disposal (also referred to as interim sale, interlocutory sale, early sale or anticipated sale), which consists in disposing of assets before a final court decision. States must strike a balance between the cost-efficiency of asset management and the legitimate interest of the owner in the preservation and return of the asset when a confiscation order is not granted.

Therefore, priority should be given to obtaining the owner's consent, which allows the costs related to interim management to be mitigated while protecting the owner's substantive and procedural rights.

Pre-confiscation sale or disposal should also be allowed even without the owner's consent for certain categories of assets, such as the following:

- Perishable assets
- Rapidly depreciating property
- Assets whose storage or maintenance cost is disproportionate to their value
- Assets that are difficult to manage, or whose management requires special conditions or expertise not readily available
- Assets that are easy to replace
- Assets whose owner has absconded

Some countries also allow the sale of assets under certain additional conditions in order to pay for the costs of legal representation and expenses incurred for other seized assets.

Proceeds from pre-confiscation sale or disposal should be secured until a final decision is reached. Legislation should also determine who receives the interest earned, if any, in case the property is returned to the owner. The identity of buyers should be protected to avoid retaliation by the former possessor.

Guideline 3

States should provide for a range of choices for interim measures, including (a) retaining the asset in the possession of the owner or possessor; (b) potentially, the interim use of assets; and (c) the destruction of unsafe, hazardous property

With a view to the policy objectives of the interim stage, legislation should include the possibility of (a) retaining an asset under the custody and control of its owner or the persons or entity that held it prior to the interim order, subject to restrictions on use, together with a positive obligation to maintain its value (freezing instead of seizure); (b) placing the asset in the custody of a third party, including the State and its institutions, which can ensure its productive use; and (c) destroying unsafe, hazardous property.

Leaving the asset under the control of the owner or possessor can be cost-effective, as expenditures such as those related to the cost of storage, maintenance and security may thereby be avoided. However, freezing orders also require resources, because institutions need to monitor compliance with the court's order.

The interim use of assets is a controversial measure because it may cause their deterioration and depreciation, which makes it challenging to guarantee the legitimate interest of the owner in the preservation and return of the asset when a confiscation order is not granted. States that allow for interim use of assets should carefully analyse how the measure is applied in each concrete case in order to ascertain the risk of future

claims for compensation and damage. They should require the recipient institution to provide appropriate guarantees that the asset will be returned in a good state, and may also require full-risk insurance coverage from the institution. A fund should be created with the objective of bearing the costs not covered by such an insurance policy. Unless there is a compelling purpose, the interim use of assets by law enforcement should be avoided because it can create incentives for law enforcement to seize assets for the purpose of benefiting from them, rather than for genuine law enforcement objectives.

When dealing with hazardous property, States should ensure that the procedure for its disposal is speedy and efficient, including when the asset is under the control of third parties.

Guideline 4

States should notify third parties of the interim measures and give them the opportunity to challenge them before a judicial authority

States must ensure the protection of bona fide third parties during the period of effectiveness of interim measures (see art. 31, para. 9, of the Convention). In this regard, States should consider adopting legislation to guarantee that (a) the interim measures are communicated to the persons or entities affected by the measures as soon as possible; and (b) those persons or entities have the opportunity to challenge them before a judicial authority at an early stage.

Distinguishing, during the interim stage, a bona fide third party from persons associated with the suspect or acting at the suspect's behest may be challenging. Thus, in order to determine the nature of third-party claims, the following factors may be assessed:

- Did the third party take action to prevent the offence?
- Is the third party implicated in any other related offence?
- Does the third party have a legitimate interest in the property and have an arm's-length relationship with the suspect?
- Did the third party act diligently and in accordance with the law in the creation of the interest in the asset?

B. Enforcement of confiscation orders and the use of confiscated assets

Guideline 5

States should provide a range of choices for confiscation, so that practitioners can take into account the most cost-efficient and productive method for the disposal of assets when ordering confiscation

When a confiscation order is requested and made, practitioners should be in a position to take informed decisions in order to fully implement the policy objectives of the confiscation. Confiscation systems should therefore allow for confiscation orders that are tailored to the specific confiscation case, including as follows:

- States should provide not only for object-based confiscation, but also for value-based confiscation that allows for the confiscation of any property the value of which corresponds to that of the proceeds of the alleged offence (see art. 31, para. 1 (a), of the Convention).
- Value-based confiscation should be an available option regardless of whether the asset constituting the proceeds of the offence is still within the property of the addressee of the confiscation order.
- When value-based confiscation orders are made, effective enforcement procedures beyond civil collection should be available. These could include special realization proceedings for confiscation cases, penal execution

proceedings against third persons cooperating with the offender or additional periods of imprisonment for non-compliance with the order. Some States use civil collection procedures but give the asset management office specific powers, for example, the right to request information on the financial situation of the convicted person from all administrative services of the Government.

- In order to ensure the practical enforceability of value-based confiscation orders, States should ensure that sufficient assets are frozen or seized from the outset.
- With regard to object-based confiscation orders, there should be a transparent procedure to decide whether to sell confiscated assets or retain them for use by the State, for example, by law enforcement.
- When confiscated assets are sold, the identity of buyers should be protected to avoid retaliation by the former possessor.

Guideline 6

States should articulate in their legislation their fundamental policy preferences for the allocation of confiscated assets

There are, in particular, two options for the disposal of confiscated assets: their allocation to the national revenue fund to meet general government priorities, or to specific objectives, such as crime prevention. Allocating confiscated proceeds to the national revenue fund may be the most cost-effective form of disposal, and has the advantage that general approval and oversight mechanisms apply in its administration. On the other hand, allocating the proceeds to specific programmes creates a direct link between asset confiscation and specific policy objectives such as the compensation of victims, the benefit of communities and the fight against crime, thus adding symbolic value to the allocation. Moreover, it makes it easier to track the use of confiscated assets and makes their use concretely visible.

Guideline 7

When States allocate confiscated proceeds to specific objectives, they should establish clear rules for determining the beneficiaries

States that have opted to allocate proceeds to specific objectives should lay down clear and detailed rules on how the beneficiaries of confiscation orders are determined, which may include the following:

- Some countries have opted for the proceeds of confiscation orders to be paid into a designated asset recovery fund established by law. This is an interesting option when funds to be allocated exceed a critical mass. Asset recovery funds require their own infrastructure and oversight mechanisms (see guideline 8).
- Some countries allow the proceeds of the disposal of assets to be used to fund the asset management office. This can significantly boost the asset recovery programme, in particular in countries with intense competition for resources from other priorities. Such an approach can lead to wholly or partially self-funding asset management offices (see guideline 14).
- Some countries also allow the use of confiscated proceeds for specific law enforcement purposes outside of the ordinary budgetary process (see guideline 8).
- Several international instruments encourage States to prioritize the use of the proceeds of a crime to compensate its victims (e.g., art. 35 of the Convention against Corruption and art. 25 of the United Nations Convention against Transnational Organized Crime).
- Social reuse initiatives make the confiscated property available to the affected communities in an effort to restore compliance with and confidence in the rule of law. Social reuse is particularly relevant to societies in which criminal groups

have become so entrenched in communities that law enforcement action against them is met with hostility, if not active resistance (see guideline 8).

Guideline 8

Disposal of assets must be managed with transparency and accountability, in particular when specific funds or programmes are used

In all cases, transparency and accountability are key factors for the effective management and disposal of assets, as well as for addressing corruption risks inside asset management offices themselves. This is of particular importance where general transparency and accountability rules do not apply, for example, where specific structures for disposal have been established. Asset recovery funds or specific projects need to allocate capacity and resources to ensure the transparent management and accountability of such structures. In that regard, the following should be taken into consideration:

- If a country chooses to establish an asset recovery fund, the law should specify the persons with responsibility for making decisions regarding the fund, the purposes for which the deposited funds can be used and the fund's oversight mechanisms, including clear audit and reporting obligations. Special funds typically require infrastructure to manage and account for deposits received and outgoing transfers. Where the legislation is silent on the purposes for which the funds may be used, mechanisms must be put in place to ensure their fair and transparent allocation. After the costs associated with the management and sale of an asset are recouped and the victims' claims are satisfied, a certain amount may be retained for operational expenses, under strict auditing controls.
- If law enforcement agencies are allowed to benefit from confiscated assets, safeguards should be established to avoid any direct link between confiscated assets and rewards provided to law enforcement officials, in order to avoid creating improper incentives.
- If States institute social reuse initiatives, they should develop a coherent strategy for their implementation and verify the use to which the allocated funds or assets have been put. Moreover, States should ensure that the necessary infrastructure is in place to support, monitor and account for such projects.

Guideline 9

States should have procedures for the prompt return of confiscated assets if the order is not granted

In the event that the accused is acquitted or a final confiscation order is not issued, the property must ordinarily be returned as quickly as possible. The circumstances under which an owner is entitled to claim compensation should be outlined in legislation, for example, in cases where property has been lost or degraded as a result of negligence on the part of the asset manager. How such claims are to be administered should be specified in the legislation. States should ensure that the responsible authority is not exposed to incalculable risks in terms of compensation claims, either by limiting its liability to only that of gross negligence and intentional damage caused to the asset or by providing for insurance coverage against such risks.

In some States, before returning seized property to its owner, government departments that have outstanding debts owed to them by the accused are allowed to recover payment from the seized funds. This applies in particular to tax authorities and social security contributions.

Guideline 10

All persons having an interest in the assets should have an opportunity to make their claim known

Third parties should be notified of the confiscation order and have the opportunity to make their claim known during confiscation proceedings, as during the interim phase (see guideline 4).

C. Institutional structure for asset management

Guideline 11

When establishing their asset management offices, States should take into account the volume of assets being seized and confiscated, the skill set already available in their public institutions and the requirements for autonomy and accountability of the asset management office, and ensure that it may participate in pre-seizure planning

States have developed a variety of institutional arrangements for the cost-effective preservation of seized assets and for securing the maximum return on the confiscated assets. The following broad categories lend themselves to further consideration by States wishing to establish an asset management office:

- *Asset management offices located within an existing law enforcement agency or responsible ministry* (examples of States with such arrangements include Belgium, Czechia, the Netherlands, Thailand and the United States of America). In some of these countries, the asset management office is also responsible for promoting asset confiscation as a law enforcement tool, in addition to the usual asset management functions. For example, such offices have a role in asset tracing, training and advising other practitioners on confiscation, serving as the focal point for international asset recovery cooperation, pre-seizure planning, litigation support or distribution of proceeds.

- *Asset management offices located within public service entities with additional property management-related functions* (examples of States with such arrangements include Australia, Mexico and New Zealand). These offices make full use of the specialized and multidimensional skills typically available in property management offices.

- *Self-standing asset management offices* (examples of States with such arrangements include Canada, Colombia, France and Honduras). This option is considered particularly desirable when the scale of confiscated assets has reached a level that justifies the cost of operating such an office. The establishment of a self-standing asset management office can also be motivated by a desire to separate investigative and prosecutorial functions from asset management functions. All institutions must remain diligent in ensuring fluid communication between investigative, prosecutorial and managerial bodies.

Notwithstanding the institutional arrangements a State chooses, in some legal systems courts generally appoint the asset management office as the receiver of the assets. Furthermore, in some countries, judicial managers are appointed specifically to deal with complex assets. Alternatively, an asset management office may employ contractors from the private sector for that purpose (see guideline 12).

Guideline 12

States should equip their asset management offices with the skills and capacities, as well as empower them to enter into any necessary agreements, as required for their effective functioning

The same capacities, functions and expertise are typically required, regardless of the type of asset management system in place, including the following:

- Expertise in asset inspection, appraisal and valuation
- Asset registration and data management (see guideline 13)
- Storage and transportation facilities
- Specialized skills related to the management of complex assets
- The capacity to provide pre-seizure advice to other authorities

Depending on the size of the office, the assets regularly managed and the resources available, such capacity may be developed in-house or provided by external contractors.

Asset management offices should be able to either contract all necessary expertise or apply to the court for the appointment of asset managers with specific expertise not available in the asset management office. In addition, asset management offices should be able to enter into any contracts that make their work cost-effective, for example, to make improvements to an asset that go beyond mere maintenance, with the aim of selling the asset at a better price.

Guideline 13

States should invest in the resources necessary for central asset registration, databases and data management

Monitoring the location, maintenance, costs incurred and payments made with regard to an asset management order is important for the effective and accountable management of assets. Such information should be kept throughout all phases of a case, including investigation, interim measures, confiscation and disposal. Even if different law enforcement agencies own the information, it should be fed, consistently, into a centralized, structured database maintained by specialized personnel (detailed recommendations on the content of such databases have been made by the Organization of American States). Ensuring consistency may require the allocation of special resources. Many States have developed their own information technology solutions, as existing databases have not met their expectations.

Guideline 14

States should ensure that, over time, asset management offices become economically viable, and should assess whether the offices should be allowed to fund their operations wholly or partially from confiscated proceeds

The asset management office should include in its budget, inter alia, the following:

- General operating costs, including those related to the staffing of the office with the necessary skills and capacities (see guideline 11), office space and the employment of specialist contractors
- For seized assets, the costs of registration and data management (see guideline 13), storage and active maintenance incurred to maintain the value or profitability of the asset, including for improvements enabling it to be sold at a better price
- Costs related to the monitoring of compliance with the conditions imposed in a freezing order
- Litigation costs

Which funding model is employed to maintain the asset management office depends on the decisions taken with regard to the disposal of confiscated assets (see guidelines 6 and 7), in particular whether the asset management office can be funded from recovered proceeds.

Over time, the operating costs of asset management offices might increasingly be financed from the proceeds of the sale of confiscated property, the income earned from investments made with seized cash and the proceeds of pre-confiscation sales, fees earned from the management of productive assets and, in some countries, from fines imposed. Some asset management offices have not only become self-funding but produce net proceeds that are regularly fed into the national budget or government funds. Nevertheless, it is important to plan for sufficient external resources for the initial stages of establishing an asset management office.

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